Supreme Court, U.S.
FILED
JUN 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

Of Counsel
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CALIFORNIA EMPLOYMENT LAW COUNCIL
555 South Flower St.
Los Angeles, CA 90071
(213) 683-6000

ZACHARY D. FASMAN
Counsel of Record for the Amici Curiae
JEFFREY M. HAHN
PAUL, HASTINGS, JANOFSKY & WALKER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 223-9000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. REVERSAL OF THE DECISION BELOW IS COMPELLED BY ERISA'S EXPLICIT STATUTORY LANGUAGE, AS INTERPRETED REPEATEDLY BY THE COURT	8
A. The Decision Below Conflicts with ERISA's Express Statutory Language	8
B. The Court Repeatedly Has Read ERISA's Preemption Provision as Broadly as the Language Itself Indicates	12
C. A Similar Broad Reading of ERISA's Preemption Provision is Required in this Case to Protect Congressional Judgments About the Scope and Type of Remedies That Should be Available to Protect Plan Beneficiaries	16
II. THERE IS NO PRINCIPLED BASIS FOR LIMITING THE SCOPE OF ERISA PREEMPTION IN THIS CASE	18
A. The Decision of the Court Below Is Simply Wrong Insofar as It Concludes That the States May Supplement Federal Remedies Because the State and Federal Laws Have Congruent Purposes	18
B. Employer Liabilities Fall Within ERISA's Preemption Provision	21
III. THE DECISION BELOW POSES AN ESPECIALLY DAUNTING THREAT TO THE FEDERAL INTERESTS THAT CONGRESS SOUGHT TO PROTECT IN ERISA	26
CONCLUSION	28

TABLE OF AUTHORITIES

CASES

	Page
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	5, 12, 15
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	11
English v. General Electric Co., —— U.S. ——, 58 U.S.L.W. 4679 (June 4, 1990)	8, 20
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987)	24, 25
Garner v. Teamsters, 346 U.S. 485 (1953)	19, 20
Mackey v. Lanier Collections Agency & Service, 486 U.S. 825 (1988)	20
Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985)	16, 17
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	20, 25
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)	11
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	*passim*
Richardson v. Mellish, 2 Bing. 229, 130 Eng. Rep. 294 (1824)	12
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	19, 20
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	13, 15
Tafflin v. Levitt, —— U.S. ——, 110 S. Ct. 792 (1990)	11
Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282 (1986)	7, 19
Yellow Freight System, Inc. v. Donnelly, —— U.S. ——, 110 S. Ct. 1566 (1990)	11

STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*	
ERISA §§ 202 and 203, 29 U.S.C. §§ 1052 and 1053	22
ERISA § 209, 29 U.S.C. § 1059	22

TABLE OF AUTHORITIES—Continued

	Page
ERISA §§ 302 and 303, 29 U.S.C. §§ 1082 and 1083	22
ERISA § 502(a), 29 U.S.C. § 1132(a)	3, 16, 23
ERISA § 502(e), 29 U.S.C. § 1132(e)	3
ERISA § 510, 29 U.S.C. § 1140	2, 9, 23
ERISA § 511, 29 U.S.C. § 1141	23
ERISA § 514(a), 29 U.S.C. § 1144(a)	3, 6, 8, 9
ERISA § 514(b), 29 U.S.C. § 1144(b)	10
ERISA §§ 4062 to 4064, 29 U.S.C. §§ 1362 to 1364	23

LEGISLATIVE MATERIALS

H.R. 2, 93d Cong., 2d Sess. (March 4, 1974)	13
H.R. 2, 93d Cong., 2d Sess. (March 6, 1974)	13
H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973)	23
Amdt. No. 496 to S. 4, 93d Cong., 1st Sess. § 699(a) (Sept. 17, 1973)	13
S. Rep. No. 127, 93d Cong., 1st Sess. (1973)	13
102 Cong. Rec. S15,762 (daily ed. Aug. 22, 1974)	17
120 Cong. Rec. 4295 (1974)	24
120 Cong. Rec. 4308 (1974)	24
120 Cong. Rec. 29197 (1974)	12
120 Cong. Rec. 29211 (1974)	24
120 Cong. Rec. 29933 (1974)	14
120 Cong. Rec. 29942 (1974)	13
120 Cong. Rec. 29944 (1974)	24

MISCELLANEOUS

Bacon, "See You In Court," Nation's Bus., July 1989, at 17	4
Bradsher, "Firms Ask that Workers Waive Job Security," L.A. Times, July 31, 1988, § 1, at 1, col. 2	27
"Employment at Will State Rulings Chart," I.E.R.M. (BNA), at 505:51 (1989)	4
"Its Getting Harder to Pass Out Pink Slips," Bus. Wk., March 28, 1988, at 68	4
Jung & Harkness, "The Facts of Wrongful Discharge," 4 Lab. Law. 257 (1988)	27

TABLE OF AUTHORITIES—Continued

	Page
Lopatka & Martin, "Developments in the Law of Wrongful Discharge," ABA Division for Professional Education, National Institute on Litigating Wrongful Discharge and Invasion of Privacy Claims (1986)	27
Pension and Welfare Benefits Administration, U.S. Dept. of Labor, "Trends in Pensions" (1989)	5
Swoboda, "A Spotlight on Pension Funding," Wash. Post, May 8, 1990, at C1, col. 2	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1298

INGERSOLL-RAND COMPANY,
Petitioner,
v.
PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

1. The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents nearly 180,000 businesses and organizations and serves as the principal voice of the American business community.

2. The California Employment Law Council ("the CELC") is a voluntary, nonprofit organization composed of more than 60 companies employing over 400,000 persons. Its members represent a broad segment of the employer community in California. The CELC was formed

to promote the common interests of employers and the public in fostering reasonable and equitable laws pertaining to employment practices.

3. The Amici's members have a vital interest in preserving the uniform and exclusive federal regulation of pension plans intended by Congress when it passed the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Our members have expended billions of dollars on pension plans governed by ERISA's intricate statutory scheme and employ thousands of individuals who stand to benefit from such plans. The threat to the interests of our members from the decision of the Supreme Court of Texas is national in scope. If states are allowed to recognize a "public policy" tort of wrongful discharge for interference with pension plan rights, the many thousands of employees across the country who are close to vesting in their pension rights and are terminated in the normal course of business will become potential state court tort plaintiffs. Our members who maintain ERISA plans thus will find themselves subject to a significant liability that did not exist when they decided to begin such plans—awards of compensatory and punitive damages under state law. Those of our members who have not yet established pension plans will be discouraged from doing so, precisely the result that Congress sought to avoid when it carefully defined the extent of employer liability under ERISA.

4. As part of ERISA's comprehensive federal regulation of virtually all aspects of employee benefit plans, Congress specifically prohibited the discharge of an employee for the purpose of interfering with the attainment of any right to which the employee may become entitled under a covered plan.[1] Congress also vested exclusive

[1] Section 510 of ERISA, 29 U.S.C. § 1140, provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the [employee benefit] plan.

jurisdiction over such claims in the federal courts, thereby precluding state adjudication.[2] Congress further provided that such claims could be remedied only through the entry of injunctive or other appropriate equitable relief,[3] a limitation that the decision below destroys by allowing awards of punitive and compensatory damages against employers.

5. These statutory provisions are part and parcel of Congress' broader purpose of replacing haphazard state regulation with a uniform set of national rules, and thereby to encourage the formation and maintenance of ERISA plans. It was for this reason that Congress broadly preempted any and all state laws "insofar as they may now or hereafter relate to" any covered benefit plan.[4] Our members deciding whether to create pension plans, and those who deal on a daily basis with the intricacies of maintaining such plans, thus have been

[2] Section 502(e) of ERISA, 29 U.S.C. § 1132(e), provides for exclusive federal jurisdiction over ERISA discharge claims as follows:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary.

[3] Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides for relief in ERISA discharge cases as follows:

> A civil action may be brought—
>
> . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

[4] 29 U.S.C. § 1144(a).

guaranteed a defined, uniform, and exclusive set of national rules.

6. The ERISA remedial scheme thus embodies a delicate balance between the interests of employers, labor organizations and plan participants, undertaken by Congress with the full knowledge that the imposition of excessive costs upon employers would discourage the formation of new retirement plans. If the Court upholds the decision below, states will be able to unsettle this delicate balance, contrary to Congress' express desire to insulate pension plan regulation from precisely such state interference.

7. The public policy tort recognized by the decision below poses an especially daunting threat to the balance struck by Congress in ERISA. During the past decade, the proliferation of wrongful discharge claims proceeded at an astounding rate, subjecting employers to previously unrecognized causes of action. At least thirty-nine states now recognize a cause of action for wrongful discharge in violation of "public policy."[5] Thousands of such lawsuits have been filed across the country, resulting in six- and seven-figure awards for compensatory and punitive damages.[6] These state laws establish widely varying standards of employer conduct. The same employment decision lawful under federal and some state laws may be unlawful under other state laws, a situation especially difficult for multi-state employers. Compounding these problems, the proliferation of ERISA pension plans has created an even larger universe of potential state law

[5] *See* "Employment At Will State Rulings Chart," I.E.R.M. (BNA), at 505:51 (1989).

[6] One research firm has determined that the national average damage award in cases based on wrongful termination rose from $227,280 in 1986 to $311,332 in 1987. *See* Bacon, "See You In Court," Nation's Bus., July 1989, at 17. Columbia University professor Alan F. Westin has estimated that some 25,000 wrongful discharge cases were pending in federal and state courts in 1987. *See* "It's Getting Harder to Pass Out Pink Slips," Bus. Wk., March 28, 1988, at 68.

wrongful discharge plaintiffs who are about to vest in their pension rights.[7] If states are allowed to recognize the public policy tort created by the decision below, the proliferation of substantial and unpredictable awards for compensatory and punitive damages will discourage employers from establishing pension plans, precisely the result that Congress intended to avoid when it carefully devised ERISA's exclusive remedies.

Our members therefore have an obvious and growing interest in ensuring that the uniform and exclusive federal rules relating to employee pension plans remain free from state interference, and that congressional decisions regarding the liability of employers in connection with such plans be preserved from contrary state judgments.[8]

SUMMARY OF ARGUMENT

1. Reversal of the decision below is necessary to preserve ERISA's uniform and comprehensive statutory scheme from state interference. When it created ERISA's detailed and pervasive federal code regulating employee benefit plans, Congress determined that uniform and exclusive federal regulation of benefit plans was required. Congress therefore preempted all state laws relating to benefit plans in one of the clearest and broadest preemption provisions in federal law. The Court repeatedly has recognized, in a line of cases beginning with *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), that ERISA's broad express preemption provision was designed by Congress to ensure that an exclusive set of fed-

[7] According to the most recent Department of Labor data, employers in 1987 maintained some 872,000 private pension plans, covering 41.9 million workers. *See* Pension and Welfare Benefits Administration, U.S. Dept. of Labor, "Trends in Pensions" 13, Table 1.3 (1989).

[8] The parties have consented to the filing of this brief. Consent letters are on file with the Clerk of the Court.

eral rules governs the complex area of employee benefit plans.

2. This broad preemption provision, which explicitly states that the provisions of ERISA "supersede" any state laws "insofar as they may now or hereafter relate to" any covered benefit plan,[9] precludes Texas' effort to supplement federal remedies for a wrong specifically recognized in the text of ERISA. A state law with the express purpose of prohibiting interference with pension plan rights owes its very existence to the plan, and thus "relates to" a pension plan within the meaning of ERISA. Moreover, ERISA's prohibition of precisely the same conduct must "supersede" such a state law. While Congress created several detailed and specific exceptions to ERISA's broad express preemption provision, none of these exceptions even remotely sanctions a state law duplicating ERISA's protection of plan rights. Not only has Congress already protected the very rights that Texas seeks to vindicate by application of its state law; Congress also chose to provide only equitable relief for such violations, and to insulate such discharge claims from any state interference to the maximum extent possible by vesting exclusive jurdisdiction over ERISA discharge claims in the federal courts. The decision below conflicts with each of these explicit statutory provisions.

3. The Court repeatedly has read ERISA's broad preemption provision literally, and specifically has held that ERISA's detailed federal remedial scheme preempts state tort claims remediable through compensatory and punitive damages. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). A similar reading is required in this case. Congress carefully balanced protection of plan participants against the disincentives to plan formation that excessive employer liabilities would create—a balance critical to the success of the voluntary private pension system being created. By subjecting employers to addi-

[9] 29 U.S.C. § 1144(a).

tional state damages for maintaining federally-controlled pension plans, the decision below destroys this careful legislative balance.

4. It is no answer to say that Texas merely is adding a sanction to conduct already prohibited by federal law. The states are not free to determine that Congress has created insufficient remedies to vindicate federal interests, especially where, as here, the congressional choice of remedy serves as part of an integrated remedial scheme deliberately designed to balance the competing interests of employers and plan participants. In a line of cases exemplified by *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986), the Court uniformly has rejected the notion that the states are free to add sanctions where Congress has prohibited conduct under federal law and created an exclusive federal statutory remedy.

5. Normal ERISA preemption principles fully apply to cases involving the liabilities of employers. There is no statutory or logical basis for limiting ERISA's preemption provision to the rights and liabilities of plan administrators or fiduciaries. ERISA imposes many obligations and liabilities on employers who maintain benefit plans, and Congress nowhere even intimated that ERISA's broad preemption provision somehow was not meant to apply to these portions of the statute. Exclusion of employer liabilities from the reach of ERISA preemption would ignore completely Congress' pivotal concern that imposition of excessive liabilities upon employers would discourage the formation of voluntary benefit plans.

ARGUMENT

I. REVERSAL OF THE DECISION BELOW IS COMPELLED BY ERISA'S EXPLICIT STATUTORY LANGUAGE, AS INTERPRETED REPEATEDLY BY THE COURT.

A. The Decision Below Conflicts with ERISA's Express Statutory Language.

The decision below conflicts with ERISA's explicit and unequivocal preemption provision, designed by Congress as a fundamental and critically important part of ERISA's statutory scheme. ERISA's preemption provision is express and extremely broad in scope, providing that "the provisions of [ERISA] . . . *supersede any and all State laws* insofar as they may now or hereafter *relate to* any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a) (emphasis added). The Court repeatedly has struck down state attempts to infringe upon the exclusive sphere of federal regulation, recognizing the "expansive sweep of [ERISA's] preemption clause" giving it a "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987).[10]

[10] As the Court recently noted, "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. General Electric Co.*, —— U.S. ——, 58 U.S.L.W. 4679, 4681 (June 4, 1990). Because this case involves a broad and express statutory preemption provision, it is fundamentally different from the *English* case, in which the Court, in the absence of any express preemption provision, was required to divine the congressional intent underlying various federal nuclear regulatory enactments and concluded that Congress preempted state power over nuclear energy only to the extent that the state action had a "direct and substantial effect" on the federal interest in radiological safety. *Id.*, at 4683. In ERISA, by contrast, Congress expressly preempted all state power to regulate employee benefit plans, and explicitly stated that the provisions of ERISA would supersede any state law that "relate[s] to" an employee benefit plan.

A state wrongful discharge claim designed to protect pension plan rights plainly has a "connection with or reference to" a pension plan; such a claim exists only because an ERISA plan exists. Congress itself recognized the obvious tie between such a discharge and an ERISA plan, because it specifically prohibited discharges interfering with *pension plan rights* in its comprehensive regulation of pension plans.[11] Indeed, if the cause of action judicially recognized by the Supreme Court of Texas instead was statutorily based, the state statute at issue would mimic (if not expand upon) Section 510's protection of pension plan rights. As a matter of both logic and express statutory language, ERISA therefore must preempt a state public policy tort seeking to protect *pension plan* rights that already are protected by federal law.

This conclusion is compelled as well by the language in ERISA's preemption provision to the effect that "*the provisions of this subchapter . . . supersede* any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). The narrowest possible reading of this preemption provision would accord preclusive effect to the express provisions of ERISA. Section 510's prohibition of interference with pension plan rights certainly is one of the "provisions of this subchapter," and thus the cause of action recognized by the state of Texas, which mirrors Section 510's prohibition, must be a state law that is superseded by ERISA.

Congress did create a number of specific and narrow exceptions to ERISA's express preemption provision, but

[11] The very language Congress used in this prohibition makes reference to a *pension plan*: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under *the plan*." 29 U.S.C. § 1140 (emphasis added).

none of these is even arguably applicable to this case. The two principal exceptions clarify that the preemption provision should not "be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities" [12] and does not apply "to any generally applicable criminal law of a State." [13] No exception was created for state laws prohibiting discharges interfering with pension plan rights; no exception was created for state laws that impose liabilities on employers and not plan administrators or fiduciaries; and no exception was created for state laws that purport to vindicate the same interests protected by ERISA's federal scheme. This precise congressional specification of exceptions to ERISA's broad preemption provision indicates legislative intention that preemption apply in all other cases.

Indeed, not only did Congress preempt all state substantive law in ERISA; Congress additionally vested exclusive jurisdiction over ERISA claims in the federal

---

[12] 29 U.S.C. § 1144(b)(2)(A). Congress did create a "proviso" to this exception in the so-called "deemer clause." *See* 29 U.S.C. § 1144(b)(2)(B). The rather complex nature of this provision/exception/deemer clause scheme demonstrates the care that Congress utilized in drafting ERISA's preemption provision.

[13] 29 U.S.C. § 1144(b)(4). The other five "exceptions" constitute both actual exceptions and rules of construction and may be summarized as follows: (1) Causes of action which arose, or any act or omission which occurred, before January 1, 1975, are not preempted. 29 U.S.C. § 1144(b)(1). (2) Nothing in the preemption provision prohibits use by the Secretary of Labor of the services or facilities of a State agency as permitted under § 506 of the Act. 29 U.S.C. § 1144(b)(3). (3) With certain exceptions, the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51) is not preempted. 29 U.S.C. § 1144(b)(5). (4) Certain specific exceptions are created for state insurance laws regulating reserves and contributions by certain multiple employer welfare benefit plans. 29 U.S.C. § 1144(b)(6). (5) Domestic relations orders are not affected by the preemption provision. 29 U.S.C. § 1144(b)(7).

courts,[14] even more clearly indicating its belief that uniform national regulation of pension plans was essential. Exclusive federal jurisdiction is manifestly unusual in our federal system, in which state and federal courts generally share concurrent jurisdiction over federal claims. *See, e.g., Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962). *See also Yellow Freight System, Inc. v. Donnelly*, —— U.S. ——, 110 S. Ct. 1566 (1990); *Tafflin v. Levitt*, —— U.S. ——, 110 S. Ct. 792 (1990). In the recent *Yellow Freight* decision, the Court pointed to ERISA as one prime example of the unusual situation where Congress so clearly seeks to preclude state interference that it chooses to vest exclusive jurisdiction in the federal courts. 110 S. Ct., at 1569 n.3.[15]

Congress' unusual choice of an exclusive federal forum, as part of an enforcement scheme that insulates ERISA-related discharge claims from any substantive state interference, would be nullified if the decision below is allowed to stand. Any plaintiff could evade Congress' explicit choice of an exclusive federal forum (and its decision to allow only equitable relief) merely by labeling his

---

[14] *See supra*, note 2.

[15] Not only did Congress vest exclusive jurisdiction over ERISA claims in the federal courts, but it preempted state law so completely that removal on the basis of an ERISA preemption defense is appropriate. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), the Court recognized that under the well-pleaded complaint rule, a preemption defense only supports removal where Congress has "so completely pre-empt[ed] a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." *Id.*, at 63-64. In *Metropolitan Life Ins. Co.*, the Court held that Congress intended the preemptive force of ERISA's enforcement mechanisms in § 502 of the Act to be so complete that an ERISA preemption defense provides a sufficient basis for removal. *Id.*, at 66-67. Clearly, then, the decision below creating a state enforcement mechanism in an area already remediable under § 502 of ERISA must fall from ERISA's preemptive force.

or her discharge claim as a violation of state "public policy." [16] A state court that would not even have jurisdiction over the same claim, based upon exactly the same facts and exactly the same federal policy if pleaded under ERISA, would be empowered by artful pleading to award compensatory and punitive damages far in excess of the relief contemplated by Congress when it created ERISA. To avoid this anomalous result and protect Congress' explicit choice of an exclusive federal forum for ERISA discharge claims, the decision below should be reversed.

B. The Court Repeatedly Has Read ERISA's Preemption Provision as Broadly as the Language Itself Indicates.

The Court repeatedly has emphasized that ERISA's express statutory language, and its legislative history, demonstrate that Congress made a deliberate decision to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). As the Court explained in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), "[t]he House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions." Indeed, in *Pilot Life Ins. Co.*, the Court quoted one sponsor of the act who characterized the "'reservation to Federal [authority of] the sole power to regulate the field of employee benefit plans' as ERISA's 'crowning achievement.'" *Id.* (quoting 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent)).

ERISA's broad preemption provision replaced a much narrower proposed provision that Congress specifically rejected.[17] The Court recognized the importance of this

[16] As described by the English courts more than 150 years ago, public policy "is a very unruly horse, and . . . once you get astride it you never know where it will carry you." *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824).

[17] The provision, as passed by the Senate, preempted only state laws "insofar as they may now or hereafter relate to the subject

deliberate congressional choice of a broad preemption provision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983):

> The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. [Footnote omitted.] The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's preemptive scope was as broad as its language. *See* H.R. Conf. Rep. No. 93-1280, p. 383 (1974); S. Conf. Rep. No. 93-1090, p. 383 (1974).

By deliberately adopting the broad preemption provision ultimately enacted, Congress clearly intended to preclude state laws interfering with the enforcement mechanisms created in ERISA. Senator Williams, in a statement cited by the Court in *Pilot Life Ins. Co.*, made this abundantly clear during the floor debate on the final bill, stating:

> 'It should be stressed that with the narrow exceptions specified in the bill, the substantive and *enforcement provisions* of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or incon-

matters regulated by this Act. . . ." H.R. 2, 93d Cong., 2d Sess. § 699(a) (March 4, 1974), *reprinted in* 3 Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974 ("Leg. Hist.") 3599, 3820 (Comm. Print 1976). *See also* H.R. 2, 93d Cong., 2d Sess. § 514(a) (March 6, 1974), 3 Leg. Hist. 3898, 4057-58 (House version); S. Rep. No. 127, 93d Cong., 1st Sess. p. 47 (1973), 1 Leg. Hist. 587, 633; Amdt. No. 496 to S. 4, 93d Cong., 1st Sess. § 699(a) (Sept. 17, 1973), 1 Leg. Hist. 1271, 1494. The legislative history indicates that Congress specifically found this narrower preemption provision unacceptable. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 n.20 (1983) (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)).

> sistent State and local regulation of employee benefit plans.'

481 U.S., at 46 (quoting 120 Cong. Rec. 29933 (1974)) (emphasis added). Significantly, Senator Williams' statement followed immediately after a discussion of ERISA's prohibition against interference with plan rights. Indeed, the ERISA provisions protecting plan rights, vesting exclusive jurisdiction over such claims in the federal courts and making available a limited set of equitable remedies, *all* constitute ERISA "enforcement provisions." ERISA therefore must preempt the state public policy tort recognized by the decision below, which creates a state protection of ERISA plan rights enforceable in state court and remediable through compensatory and punitive damages.

Consistent with this conclusion, the Court has applied ERISA's preemption provision to the very congressional choice of remedies implicated in this case. In *Pilot Life Ins. Co.*, 481 U.S., at 47-48, the Court held that Section 514 of ERISA preempted three state tort claims—for tortious breach of contract, breach of fiduciary duties and fraud in the inducement—alleging a failure to provide benefits under a long term disability employee benefit insurance plan. In so holding, the Court explicitly emphasized that ERISA's comprehensive civil enforcement scheme "is one of the essential tools for accomplishing the stated purposes of ERISA" and functions as "the exclusive vehicle" for protecting ERISA rights. *Id.*, at 52. Leaving no doubt that states could not impose supplemental remedies relating to conduct prohibited by ERISA, the Court stated:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. *The policy choices reflected in the in-*

> *clusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.*

Id., at 54 (emphasis added).

The Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), similarly recognizes the broad reach of ERISA's preemption provision. In *Alessi*, the Court held that ERISA preempted a New Jersey law prohibiting workers' compensation benefits from being used to offset pension benefits because the state law "relate[d] to" pension plans. *Id.*, at 522-23. Significantly, the state law preempted in *Alessi* at least served the legitimate state interest of regulating workers' compensation calculations. The wrongful discharge action recognized by the court below, by contrast, expressly vindicates the federal interest in protecting ERISA benefits, and thus even more closely "relate[s] to" pension benefits than the state law struck down in *Alessi*.

Indeed, in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), the Court struck down a state law even though it did not touch upon a prohibition specifically set forth in ERISA. The Court had "no difficulty in concluding that" ERISA preempted a New York Human Rights Law forbidding discrimination in employee benefit plans on the basis of pregnancy because it "'relate[s] to' employee benefit plans." *Id.*, at 96-100. Significantly, the sex discrimination prohibited by the New York law at issue in *Shaw* is not even specifically prohibited by ERISA, which contains no prohibition against sex discrimination in benefit plans. In this case the federal-state conflict is far clearer, because ERISA expressly prohibits discharge for the purpose of interfering with pension plan rights, provides a defined set of limited remedies, and vests the federal courts with exclusive jurisdiction over such claims.

C. A Similar Broad Reading of ERISA's Preemption Provision is Required in this Case to Protect Congressional Judgments About the Scope and Type of Remedies That Should be Available to Protect Plan Beneficiaries.

Congress specifically authorized federal courts to issue equitable as opposed to legal relief in most suits brought under ERISA by plan participants. *See* 29 U.S.C. § 1132 (a)(3). Congress did not arrive inadvertently at this choice of remedies; rather, it deliberately chose equitable relief as a fundamental part of ERISA's statutory scheme. As the Court observed in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985), an earlier version of ERISA would have authorized the entry of legal and equitable relief, but this language was eliminated when the Act passed. This congressional choice was deliberate and should have preclusive effect:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S. Ct. 1723, 1726, 64 L.Ed.2d 354 (1980).

Id., at 146 (emphasis in original).

Congress' central purpose in limiting ERISA remedies was carefully to balance the protections afforded employees against the liabilities to which employers would expose themselves by deciding to form benefit plans. The success of our private pension system is largely dependent upon the employer's voluntary decision to maintain a private pension plan in the first instance. Congress knew

that imposition of excessive costs upon employers would discourage the formation of new retirement plans, as the Court recognized in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S., at 148 n.17, stating, "Congress was concerned lest the cost of federal standards discourage the growth of private pension plans." Senator Nelson emphasized the importance of this concern during floor debate on the bill that eventually was enacted:

> [Costs are] an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15,762 (daily ed. Aug. 22, 1974), 3 Leg. Hist. 4800. *And see, infra*, at 23-24, and materials there cited.

The Court specifically has held that this policy choice requires preemption of state remedies in areas already addressed by ERISA's comprehensive and carefully balanced remedial scheme. In striking down the state laws at issue in *Pilot Life Ins. Co.*, 481 U.S., at 54, the Court recognized that ERISA's "comprehensive civil enforcement scheme . . . represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans" and that "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and *the balancing of policies embodied in its choice of remedies* argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." (Emphasis added.) This policy choice compels preemption in this case as well, where Texas seeks to add legal remedies to the equitable relief that ERISA already imposes upon employers who discharge employees for the purpose of interfering with plan rights.

II. THERE IS NO PRINCIPLED BASIS FOR LIMITING THE SCOPE OF ERISA PREEMPTION IN THIS CASE.

A. The Decision of the Court Below Is Simply Wrong Insofar as It Concludes That the States May Supplement Federal Remedies Because the State and Federal Laws Have Congruent Purposes.

According to the decision rendered by the Supreme Court of Texas, ERISA's express preemption provision does not preclude a wrongful discharge claim alleging interference with pension plan rights because the Respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge." *McClendon v. Ingersoll-Rand Co.*, —— Tex. ——, 779 S.W.2d 69, 71 n.3 (1989) (emphasis in original). The proposition that there is no federal-state conflict whenever the state provides more expansive remedies in order to vindicate federal interests assumes that the same Congress that was far-sighted enough to create the important federal law in question was incompetent to ensure adequate protection of the federal rights it created, and that state judgments as to appropriate remedies should be substituted for congressional decisions as to how federal interests should be protected.[18]

The Court never has embraced such an illogical assumption. In fact, well-established precedent of the

[18] The manifest disregard for deliberate federal judgments revealed by the decision below is perhaps best appreciated by considering the constitutionality of a state statute expressly authorizing state courts to entertain ERISA discharge suits, and to award compensatory and punitive damages, justified by the state's conclusion that Congress had not gone far enough in protecting the rights of employees when it enacted ERISA. The unconstitutionality of such a law is manifest, and there is no meaningful distinction between the decision below and such a statute.

Court establishes that deliberate congressional creation of an exclusive federal remedy cannot be supplanted by the states. For example, in *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286-87 (1986), the Court rejected precisely the theory espoused by the court below: that a state statute was not preempted because it merely provided supplemental penalties for violations of federal law. The Court reasoned that " 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' " *id.*, at 286 (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953)), and that the Wisconsin statute interfered with Congress' " integrated scheme of regulation' by adding a remedy to those prescribed by the NLRA," *id.*, at 287 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). The Court expressly rejected Wisconsin's argument that its "supplemental remedy" was "different in kind from those that may be ordered by the Board" because " 'to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.' " *Id.* (quoting *Garmon*, 359 U.S., at 247).

Gould is only the most recent case in which the Court has held that even though a state law seeks to advance the purpose of the federal statute, it cannot survive preemption by an exclusive federal enforcement mechanism. For example, in *San Diego Building Trades Council v. Garmon*, 359 U.S., at 246-47, the Court held that a state could not provide tort damages for picketing prohibited by the NLRA, expressly rejecting the argument that preemption did not apply because California was attempting to supplement the injunctive relief that the NLRB might obtain:

> Even the States' *salutary effort* to redress private wrongs or grant compensation for past harm cannot

be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Garmon, 359 U.S., at 247 (emphasis added).[19]

This basic preemption principle recently has been applied directly to a dispute involving the extent of ERISA preemption. In *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988), the Court held that ERISA preempts a Georgia statute that singled out ERISA welfare plan benefits for protective treatment under state garnishment procedures. The Court expressly rejected the argument that the state law was saved from preemption because it helped to effectuate ERISA's underlying purposes. Stating that "[l]egislative 'good intentions' do not save a state law that falls within the broad pre-emptive scope of § 514(a)," the Court held that ERISA "'displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.'" *Id.*, at 829-30 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)).[20]

---

[19] The supplemental remedies theory for avoiding federal preemption rests upon the mistaken assumption that preemption doctrine applies only to rights and not to remedies. This is not new, and never has been, the law. As the Court recognized in *Garner v. Teamsters*, 346 U.S. 485, 498 (1953), in holding that Pennsylvania could not extend its own form of relief to unlawful picketing governed by the NLRA, "[t]he conflict lies in remedies, not rights."

[20] ERISA thus is unlike the nuclear energy field, analyzed by the Court in *English v. General Electric Co.*, —— U.S. ——, 58 U.S.L.W. 4679 (June 4, 1990). The statutes there at issue did not reflect any "clear congressional intention," either through their express statutory language or legislative history, to make the federal remedial scheme exclusive or to bar additional state remedies. By contrast, the Court has held that under ERISA, "the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected under ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S., at 54. Indeed, in contrast to the nuclear field—where a supplementary state tort claim would not serve to undercut any federal interest—in this case a supplementary state tort remedy would undercut the primary federal interest in plan formation and maintenance, which is the very reason that Congress created a limited set of federal remedies in the first instance.

The decision below therefore rests upon a discredited theory for avoiding preemption that repeatedly has been rejected by the Court and specifically has been rejected as applied to ERISA. Indeed, the decision below illustrates the danger posed by state attempts to supplement federal remedies that are part of a comprehensive federal enforcement scheme. By seeking to protect ERISA pension plan rights through compensatory and punitive damages, the Supreme Court of Texas has interfered with Congress' judgment regarding the appropriate balance of employer and plan participant interests. While the Supreme Court of Texas vindicates one federal interest in protecting pension plan rights, it defeats another. In so doing, it ignores the basic proposition that Congress is wholly competent not only to create federal rights, but to provide an exclusive statutory scheme for their vindication. When it has done so expressly, as it has in ERISA, state courts have no business deciding, under a "public policy" rationale, that congressional remedies are inadequate.

B. Employer Liabilities Fall Within ERISA's Preemption Provision.

Respondent's argument that ERISA preempts only state laws imposing obligations or liabilities upon plan administrators and fiduciaries, as opposed to employers,[21]

---

[21] *See* Respondent's Brief in Response to Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the United States, p. 12 ("ERISA preemption should be applied sparingly, if at all, in cases where the employer itself will have to pay the damages").

is entirely unavailing. This argument for selective and sporadic application of ERISA's preemption provision contradicts ERISA's language and fundamentally misunderstands the structure and content of ERISA's statutory scheme.

ERISA's broad express preemption provision contains no hint that it is meant to apply only to some portions of ERISA's statutory scheme. Absent strong evidence that Congress intended this anomalous result, selective application of a broad and express preemption provision is entirely unwarranted. There is nothing in ERISA's text or legislative history indicating that Congress intended to protect only plan administrators and fiduciaries from additional state liabilities and obligations. As discussed *supra*, ERISA's preemption provision applies by its very terms to Section 510 of the statute, which plainly is intended to impose liabilities on employers who (unlike plan administrators or fiduciaries) are the only entities in a position to discriminate against or discharge an employee.

A narrowly cabined approach to ERISA preemption also ignores ERISA's statutory scheme, which controls plan administrators, fiduciaries and employers alike. The numerous employer obligations imposed by ERISA are plainly part and parcel of ERISA's integrated regulatory scheme. While it is the employer who must decide to begin a pension plan and who determines the level of benefits—voluntary decisions outside of the law's scope—once the decision to create a plan has been made, ERISA imposes numerous specific obligations on the employer.[22] These employer obligations are part of the

[22] These obligations include minimum vesting and participation standards, *see* 29 U.S.C. §§ 1052 and 1053, as well as the levels of contribution that an employer must make to a plan, *see* 29 U.S.C. §§ 1082 and 1083. ERISA creates recordkeeping and reporting obligations for employers who decide to form pension plans. *See* 29 U.S.C. § 1059. Employers may be sued under Section 502 of the

careful balancing of the rights of plan beneficiaries, fiduciaries and employers undertaken by Congress when it passed ERISA, a balancing expressly premised on the need to avoid discouraging the establishment of pension plans. Indeed, in a private pension system where the ultimate decision to provide any benefits rests with the employer, a policy of clearly defined and carefully limited employer liabilities was fundamental to the success of the system.

Throughout its consideration of ERISA, Congress repeatedly emphasized the importance and ramifications of this policy choice. As the House Report stated, Congress was "constrained to recognize the voluntary nature of private" plans and accordingly weighed "[t]he relative improvements required by this Act . . . against the additional burdens to be placed on the system." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), 2 Leg. Hist. 2348. Senator Long explained the particular importance of carefully defined limited employer liabilities during the floor debate prior to final passage, stating:

> We who have worked intimately on this legislation have always kept in mind that private pension plans depend for their very existence on voluntary action. We know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, *particularly for employers* who generally foot most

Act. *See* 29 U.S.C. § 1132. Section 510, in addition to prohibting the type of discharge at issue in this case, prohibits employer retaliation against any individual who testifies in any inquiry or proceeding relating to ERISA. *See* 29 U.S.C. § 1140. Section 511 further prohibits employers from the use or threat of fraud, force or violence to intimidate a plan participant or beneficiary for the purpose of preventing or interfering with the exercise of his or her plan rights. *See* 29 U.S.C. § 1141. ERISA establishes employer liability for withdrawal from a plan as part of the many specific obligations and liabilities that it imposes upon employers. *See* 29 U.S.C. §§ 1362 through 1364.

> of the bill. This would be self-defeating and would hurt rather than help the employees for whose benefit the legislation is designed.

120 Cong. Rec. 29944-45 (1974), 3 Leg. Hist. 4778 (emphasis added).[23] Nothing in the text or legislative history of ERISA indicates that Congress intended to allow states to defeat this important congressional purpose by imposing additional liabilities upon employers, thereby adding to the disincentives to plan formation that Congress purposefully sought to limit.

We do not contend, of course, that ERISA preempts all state power with regard to employee benefits. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court held that neither ERISA nor the NLRA preempted a Maine statute requiring employers to provide a one-time severance payment to employees in the event

---

[23] *See also* 120 Cong. Rec. 4295 (1974), 2 Leg. Hist. 3415 ("since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer") (remarks of Rep. Ullman); 120 Cong. Rec. 29211 (1974), 3 Leg. Hist. 4706-4707 ("[I]t is necessary to remember that with the exception of certain collective bargaining agreements, pension plans are voluntarily set up by employers as an inducement to attract employees. In developing compromises in this area, both the committees and the conferees were necessarily cognizant of the need to encourage the continued existence of these plans. As a result, the conference report on H.R. 2 represents a true balance of the interests of all concerned.") (remarks of Rep. Rostenkowski); 120 Cong. Rec. 4308 (1974), 2 Leg. Hist. 3451 (Employers "do have some choice with respect to a voluntary pension plan, and while we had every desire to make it as splendid a set of protective requirements as we could, for the working people of this country, we had to be careful. If we overdid it, quite obviously we would have people writing us letters saying: 'How come you helped us so much that now we have no pension plan at all because our employer has decided he cannot afford it any longer under the new rules?'") (remarks of Rep. Conable).

of a plant closing. But the Maine statute at issue neither established nor required employers to maintain an employee benefit *plan* in order to provide these benefits. 482 U.S., at 6. For this reason, no *plan* was in the picture to trigger application of the ERISA preemption provision, which precludes any and all state laws relating to a benefit *plan*. *Id.*, at 7-8. Similarly, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court held that ERISA's "deemer" clause allowed the State of Massachusetts to require minimum mental health coverage for all health insurance plans offered in the State. *Metropolitan Life Ins. Co.*, 471 U.S., at 739-47. Once again, however, there was no requirement that an employer offer any such benefits or maintain an ERISA plan to provide such benefits.

In neither case was a state attempting to impose additional liabilities upon employers who decide to create ERISA plans. Certainly it does not follow from *Fort Halifax* or *Metropolitan Life* that all state laws relating to ERISA benefit *plans* are outside of ERISA's preemption provision, merely because some state authority over employee benefits remains following ERISA. Unlike *Fort Halifax* and *Metropolitan Life*, which did not involve plan-linked benefits, this case involves alleged interference with a plan right that necessarily *does* arise from an ERISA pension plan. Moreover, ERISA specifically prohibits a discharge interfering with a pension plan right, and the presence of this express federal proscription stands in marked contrast to federal legislative silence regarding minimum benefit levels involved in *Fort Halifax* and *Metropolitan Life*. This case does involve a provision in ERISA that must serve to "supersede" a duplicative and contradictory state law.

III. THE DECISION BELOW POSES AN ESPECIALLY DAUNTING THREAT TO THE FEDERAL INTERESTS THAT CONGRESS SOUGHT TO PROTECT IN ERISA.

By exposing employers who voluntarily establish pension plans to substantial and unpredictable compensatory and punitive damage awards every time they discharge an employee who is close to vesting, the decision below significantly increases employer pension plan costs that Congress carefully sought to limit when it created ERISA. Faced with the prospects of increased and unpredictable compensatory and punitive damage liabilities, some employers undoubtedly will be discouraged from establishing new plans. Employers with existing plans may be unwilling or unable to increase contributions to their pension plans when confronted with a proliferation in pension plan liabilities, especially if they are required to accrue reserves against large damage awards that may arise in state court litigation. By increasing employer liabilities, and thereby discouraging plan development or enhancement, the decision below achieves precisely the result that Congress sought to avoid. Compounding this problem, standards for awards of compensatory and punitive damages are wildly unpredictable, creating precisely the types of uncertainties that a uniform and comprehensive federal scheme is designed to eliminate.

The recent proliferation of wrongful discharge claims only serves to heighten these concerns. The past decade has seen the steady erosion of the employment at will doctrine and an explosion of wrongful discharge claims alleging a violation of public policy. As matters now stand, at least thirty-nine states recognize a cause of action for wrongful discharge in violation of public policy.[24] Thousands of such claims have been filed across the country, seeking millions of dollars in compensatory

[24] *See supra*, note 5.

and punitive damages.[25] Large awards in wrongful discharge cases have become commonplace. By one estimate, average awards in successful California wrongful discharge actions run as high as $486,812.[26] Juries have awarded as much as $20 million to single individuals in wrongful discharge cases.[27] Thus, if the decision below is left undisturbed, thousands of employers who decided to create ERISA covered pension plans in reliance on ERISA's exclusive regulatory scheme will find themselves subject to dramatically increased liabilities for compensatory and punitive damages resulting from state wrongful discharge claims.

Compounding these problems still further, the number of individuals who are about to vest in their pension rights is ever increasing. Thousands of private pension plans have been created, and more and more employees vest in their rights each year.[28] Significantly, our population will soon undergo a demographic shift, causing an inevitable increase in the number of individuals at retirement age and placing strains on our pension system. The Pension Benefit Guaranty Corp. only recently released a study identifying the 50 companies with the largest gap between the amount of money they will need to meet their pension obligations and the amount of funds

[25] *See supra*, note 6.

[26] Jung & Harkness, "The Facts of Wrongful Discharge," 4 Lab. Law. 257, 260 (1988). Other estimates are even higher. An article appearing in the Los Angeles Times on July 31, 1988, stated that average jury awards in successful wrongful discharge cases in California stood at $1,469,327 in 1987. Bradsher, "Firms Ask that Workers Waive Job Security," L.A. Times, July 31, 1988, § 1, at 1, col. 2.

[27] Lopatka & Martin, "Developments in the Law of Wrongful Discharge," ABA Division for Professional Education, National Institute on Litigating Wrongful Discharge and Invasion of Privacy Claims, 13-14 (1986).

[28] *See supra*, note 7.

they have set aside for them. The shortfall for only these 50 companies totalled $14 billion dollars.[29] Unless the decision below is reversed, at the same time that pension plans are being put to stringent financial tests, thousands of employees who are about to vest in their pension rights will be able to bring tort claims for wrongful discharge seeking extensive compensatory and punitive damages. State public policy claims, alleging wrongful discharge for interference with pension plan rights, therefore constitute a potent threat to the statutory scheme that Congress carefully crafted so as not to stem the tide of pension formation. To protect this statutory scheme from substantial state interference, the decision below should be reversed and remanded.

CONCLUSION

The decision of the Supreme Court of Texas should be reversed and remanded.

Respectfully submitted,

Of Counsel
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CALIFORNIA EMPLOYMENT LAW COUNCIL
555 South Flower St.
Los Angeles, CA 90071
(213) 683-6000

ZACHARY D. FASMAN
Counsel of Record for the Amici Curiae
JEFFREY M. HAHN
PAUL, HASTINGS, JANOFSKY & WALKER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 223-9000

June 14, 1990

---

[29] *See* Swoboda, "A Spotlight on Pension Funding," Wash. Post, May 8, 1990, at C1, col. 2.